

FEDERAL CIRCUIT COURT OF AUSTRALIA

EDA16 v MINISTER FOR IMMIGRATION

[2017] FCCA 768

Catchwords:

MIGRATION – Review of a decision of a delegate of the Minister – applicant an excluded fast track review applicant – judicial review application filed out of time – refusal of an extension of time.

Legislation:

Federal Circuit Court Rules 2001 (Cth)

Migration Act 1958 (Cth), ss.5, 5H, 5J, 36, 91W, 411, 476, 477, 487ZI, 487ZJ, 500

Cases cited:

DFE16 v Minister for Immigration & Anor [2017] FCCA 308

Minister for Immigration v SZMDS (2010) 240 CLR 611

Tran v Minister for Immigration [2014] FCA 533

Applicant:	EDA16
Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
File Number:	PEG 643 of 2016
Judgment of:	Judge Driver
Hearing date:	19 April 2017
Delivered at:	Sydney, via videolink to Perth
Delivered on:	19 April 2017

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondent: Mr P Macliver

Solicitors for the Respondent: Australian Government Solicitor

INTERLOCUTORY ORDERS

- (1) Pursuant to s.477(2) of the *Migration Act 1958* (Cth), the application for an extension of time is refused.
- (2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$5,800.

(i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

PEG 643 of 2016

EDA16

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. The applicant seeks judicial review of a decision of a delegate of the Minister (delegate) to refuse to grant the applicant a protection visa, known as a Safe Haven Enterprise Visa (SHEV). The delegate's decision was made on 19 October 2016. The judicial review application was lodged with the Perth registry on 20 December 2016. It was formally filed on 28 December 2016. Whether one has regard to the date of lodgement or the date of filing, the application was not made to the Court within the time prescribed under s.477(1) of the *Migration Act 1958* (Cth) (Migration Act). The applicant seeks an extension of time pursuant to s.477(2) of the Migration Act.
2. Background facts relating to the applicant's claims for protection and the decision of the delegate on them are set out in the Minister's outline of legal submissions filed on 12 April 2017.

3. The applicant, who claimed to be a citizen of Afghanistan, arrived in Australia at Christmas Island as an unauthorised maritime arrival on 31 March 2013, and was taken into immigration detention¹.
4. On or about 1 September 2015 the Minister exercised the discretion in s.46A of the Migration Act to allow the applicant to lodge an application for a protection visa. On 1 September 2015 the Minister's Department (Department) wrote to the applicant and invited him to apply for a subclass 785 temporary protection visa or a Subclass 790 SHEV².
5. On 30 September 2015 the applicant lodged an application for a SHEV, claiming that he feared being killed by reason of being a Shia Muslim³.
6. The applicant attended an interview with an officer of the Department on 16 December 2015. The applicant was asked to provide identity documents within three days of the interview⁴.
7. On 22 December 2015 the applicant provided the Department with copies of his and his father's Taskeras. Translations of these documents were subsequently provided⁵.
8. On 26 May 2016 the applicant provided the Department with a statutory declaration in support of his claims made on the same date. In particular, he claimed that if he returned to Afghanistan he would be in danger of being targeted by Pashtun people, including the Taliban and Islamic State, as he can be recognised as a Hazara⁶, and he also feared harm throughout Afghanistan on the basis of his Hazara ethnicity and Shia religion⁷.
9. The applicant attended a further interview with an officer of the Department on 2 June 2016 and was again asked to provide further identity documents. The applicant requested an extension of a further seven days which was granted, but no further identity documents were provided by 16 June 2016⁸.

¹ Court Book (CB) 24, 31 and 184

² CB 1-6

³ CB 9-47 and 51

⁴ CB 74-75

⁵ CB 74 and 78-91

⁶ at [16]

⁷ CB 98-101 at [17] and [19]

⁸ CB 120-125 and 188

10. On 23 June 2016 the applicant's representative provided an electronic copy of an "Afghan Citizen Proof of Registration" card to the Department, and subsequently sent the original document by registered post⁹.
11. On 25 July 2016 the applicant was sent an invitation to comment by the Department, as the Afghan Citizen Proof of Registration card had been assessed to be a bogus document. The applicant responded to this invitation on 27 July 2016¹⁰.
12. On 1 August 2016 the applicant's representative advised the Department that the applicant would not be relying upon the document previously provided as evidence of his claimed identity, nationality or citizenship of Afghanistan. The representative further advised that the applicant's Taskera was forwarded as evidence of his identity (the original of which had previously been forwarded) and a translation¹¹.
13. By letter dated 9 September 2016 the Department advised the applicant that his Afghan Citizen Proof of Registration card had been seized under s.487ZJ(1) of the Migration Act as it was reasonably suspected of being a bogus document, and therefore was deemed to be forfeited to the Commonwealth under s.487ZI(2). By a further letter of the same date the Department returned the applicant's Taskera¹².

Delegate's decision

14. On 19 October 2016 a delegate of the Minister made a decision not to grant the applicant a SHEV, as the applicant had submitted a bogus document in response to the Department's request under s.91W(1) of the Migration Act to provide documentary evidence of his identity, nationality or citizenship, without a reasonable explanation¹³.
15. The delegate further found that as the applicant had provided a bogus document without a reasonable explanation, he therefore met the definition of "excluded fast track review applicant" as defined in s.5(1)(a)(vi) of the Migration Act¹⁴.

⁹ CB 127-129

¹⁰ CB 130-136 and 153-168

¹¹ CB 140-143

¹² CB 177-180

¹³ CB 182 and 184

¹⁴ CB 200-201

16. The delegate considered that the “Afghan Citizen Proof of Registration” card provided by the applicant was a bogus document on the basis that a forensic examination of the document showed that it was a genuine NADRA/UNHCR card issued in Pakistan, but the original owner’s details had been chemically washed and there had been tampering with the photo. Biodata that remained visible under magnification showed that birth year and birth district on the card were not consistent with the birth year and birth district claimed by the applicant¹⁵.

17. The delegate stated that the applicant was invited to comment on the document pursuant to a request under s.91W(1) of the Migration Act¹⁶, but was not satisfied with the applicant’s response. In finding that the explanation was unreasonable, the delegate stated¹⁷:

The applicant is continuing to insist that the document is genuine, despite compelling evidence regarding unauthorised tampering and residual biodata information inconsistent with that provided by the applicant. As the applicant continues to maintain the document was issued to him, I am satisfied he has not provided a reasonable explanation as to why he provided a bogus document in response to a 91W(1) request. As the delegate of the Minister, I must refuse to grant a protection visa to the applicant as required under subsection 91W(2).

18. The delegate did not accept the applicant’s claim to be an Afghan citizen, instead finding that he was a citizen of Pakistan¹⁸. This finding was made taking into account the bogus document produced, concerns about the authenticity of a Taskera produced by the applicant, the past ability of the applicant to travel, information obtained from the applicant’s Facebook page and inconsistent information as to how and why the applicant disposed of his passport¹⁹.

19. In relation to the applicant’s protection claims, the delegate accepted that the applicant was an ethnic Hazara and a Shia Muslim²⁰. The delegate assessed the applicant’s claims on the basis that the relevant country of reference is Pakistan, not Afghanistan, and accepted that the

¹⁵ CB 185

¹⁶ CB 185

¹⁷ CB 186

¹⁸ CB 189

¹⁹ CB 187-189

²⁰ CB 190

applicant had a well-founded fear of persecution in Quetta and throughout his home province of Balochistan on the basis of his Hazara ethnicity and Shia Muslim religion²¹. Further, the delegate was not satisfied that there is effective state protection available in Quetta²².

20. However, the delegate was not satisfied that the applicant faces a real chance of persecution throughout Pakistan as a whole, and in particular was not satisfied that the applicant faces a real chance of persecution in Punjab, particularly in Lahore²³. Therefore, the delegate was not satisfied that the applicant had a well-founded fear of persecution under s.5J(1)(c) of the Migration Act, or is a refugee as defined by s.5H(1) of the Migration Act²⁴.
21. The delegate also considered the complementary protection criterion in s.36(2)(aa) of the Migration Act, and was not satisfied that the applicant has a real risk of significant harm if he was returned to Pakistan, as the delegate was satisfied that it was reasonable for the applicant to relocate to an area within Pakistan where he would not face a real risk of significant harm²⁵.

The present proceedings

22. On 20 December 2016 the applicant filed in this Court an application for an extension of time to review the delegate's decision. The grounds for seeking an extension of time are that:
 1. *I am a Detainee at the Yongah Hill Immigration Detention Centre in Western Australia and have been seeking Legal Representative up till the last day, then had to book a JP for the AFFIDAVIT that wasn't available on the last due date.*
 2. *I am now a Self-Represented Litigant.*
23. The application also includes the following ground for seeking review of the delegate's decision refusing his application for a SHEV:
 1. *The Purported Decision of the Delegate of the Minister for Immigration and Border Protection (Respondent) on 19 December 2016 is Legally unreasonable in that it is Vitiated*

²¹ CB 191-193

²² CB 193-194

²³ CB 194-196

²⁴ CB 196

²⁵ CB 197 and 199

by Jurisdictional Error and has Denied Me Procedural Fairness;

Particulars;

(i) *In paragraph 9 page 3 of the PROTECTION VISA DECISION RECORD, the Delegate stated; "...As the Applicant continues to maintain the document was issued to him, I am satisfied he has not provided a reasonable explanation as to why he provided a bogus document in response to a 91W(1) REQUEST.*

24. On 1 March 2017 the Court made orders to progress the matter to hearing, including that by 22 March 2017 the applicant file any amended application giving complete particulars of each ground of review, and any affidavit containing additional evidence upon which he proposes to rely relevant only to the application for an extension of time and the grounds of review.
25. The applicant has not filed any amended application or any further affidavit evidence.
26. The applicant continues to rely upon his judicial review application.
27. The applicant filed an affidavit with his application which simply identified who he is and provided a copy of the delegate's decision. The applicant has provided no evidence bearing upon his request for an extension of time.
28. The only evidence I have before me is the court book filed on 15 March 2017.
29. The applicant sought to tender in court three documents which comprise a photocopy of what purports to be an Afghan Taskera with an English translation. This Taskera is different from that reproduced in the court book²⁶. The applicant conceded that the new Taskera documents were not available to him prior to the delegate's decision. I declined to receive the documents as evidence but marked them for identification²⁷. Had I received the new documents, they would have raised more questions than they answered, given inconsistencies between this Taskera and the earlier version relied upon by the

²⁶for example at CB 151 and 152

²⁷ MFI A1

applicant. Further, as was pointed out by counsel for the Minister, the new Taskera was purportedly issued on 30 May 2012 and there is no explanation why it was not available to the applicant earlier.

30. Only the Minister has prepared written submissions in accordance with procedural orders made by a registrar.
31. I invited oral submissions from the applicant today after explaining to him the nature and purpose of today's hearing. I asked the applicant why he was late in coming to court. He referred to the problems he faced as a detainee and his inability to find anyone to assist him to prepare his application. He eventually found a person in the detention centre, also a detainee, who was willing and able to assist him. I accept that the applicant is telling the truth. His explanation, while understandable, is one that could have been made by any self-represented litigant, particularly one in immigration detention.

Consideration

The Court has jurisdiction in this matter

32. The Court has jurisdiction in this matter pursuant to s.476(1) of the Migration Act. If an extension of time were granted, the Court would have jurisdiction to review the delegate's decision as, for the purposes of s.476(1), the delegate's decision is a "migration decision" as that term is defined in s.5(1) of the Migration Act.
33. Although pursuant to s.476(2)(a) of the Migration Act, the Court has no jurisdiction in relation to "a primary decision", the delegate's decision is not a primary decision as it is not reviewable under Part 5 or 7 or s.500 of the Migration Act.
34. In particular, the delegate's decision is not a primary decision as it is not reviewable under Part 7 of the Migration Act because, pursuant to s.411(2)(c) of that Act, fast track decisions are not Part 7-reviewable decisions. The delegate's decision is a "fast track decision" as that expression is defined in s.5(1) of the Migration Act, as it was a decision to refuse to grant a protection visa to a fast track applicant.

The extension of time application

35. Pursuant to s.477(1) of the Migration Act, the time for seeking review of the delegate's decision by the Court is within 35 days of the date of the decision. The Court may, by order, extend that time under s.477(2) if an application is made to the Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order, and the Court is satisfied that it is necessary in the interests of the administration of justice to make the order.
36. As the delegate's decision was made on 19 October 2016, the 35 day time limit under s.477(1) of the Migration Act ended on 23 November 2016. The applicant is therefore at least 27 days out of time, as he did not lodge his application until 20 December 2016. That is not an insignificant delay, but not a substantial delay.
37. The applicant has not put on any affidavit evidence to explain the delay in bringing his application to review the delegate's decision. Affidavit evidence explaining the delay and showing why it is necessary in the interests of the administration of justice for the Court to grant an extension, is required by rule 44.05(2)(c) of the *Federal Circuit Court Rules 2001* (Cth). Nevertheless I accepted the statements made by the applicant from the bar table.
38. The application for an extension of time does not state why the applicant considers that it is necessary in the interests of the administration of justice to make the order to extend time, but does state that the applicant is a detainee, had been seeking a legal representative up until the last day, and is now a self-represented litigant. The applicant confirmed that explanation orally. It is well established that reasons of this kind are not a sufficient justification for failure to lodge an application for review within time²⁸.
39. In my view, the applicant's difficulties, while unfortunate and understandable, do not provide a persuasive reason for the Court to grant an extension of time in the interests of the administration of justice.

²⁸ see *Tran v Minister for Immigration* [2014] FCA 533 at [35]

40. A further fact to be considered in considering the applicant's application for an extension of time within which to make an application to this Court for review of the delegate's decision is whether there is merit in the substantive application²⁹.
41. There is a certain novelty in the applicant's case, in that he is an "excluded fast track review applicant". The provisions of the Migration Act potentially bearing upon this case are quite new, and have received little if any judicial consideration. Nevertheless, it is clear from the court book and from the delegate's reasons that the delegate had a strong logical basis for finding that the national identity card relied upon by the applicant in support of his visa application was a bogus document. Various parts of the ID card in question are reproduced in the court book³⁰. The problems are readily apparent even to the untrained eye.
42. The conclusions reached by the delegate that the applicant is not an Afghan citizen at all, but rather a citizen of Pakistan were open to him on the material before him. Further, it appears to me that the process followed by the delegate was fair. The delegate concluded that the applicant is from Pakistan and he is not at risk of serious or significant harm in the whole country. The provisions of the Migration Act relied upon by the delegate in relation to the refugee criterion do not involve a relocation decision as that term has been understood. The delegate proceeded under s.5J(1) of the Migration Act, which was considered by this Court in *DFE16 v Minister for Immigration & Anor*³¹. I respectfully agree with the views expressed by Judge Smith in that case. I otherwise agree with the Minister's submissions.
43. In his particulars to proposed Ground 1, the applicant does not allege any jurisdictional error in relation to the delegate's finding that he is a citizen of Pakistan, or in relation to the delegate's conclusion that, while satisfied that the applicant has a real chance of persecution for reasons of race and religion in Quetta and throughout Balochistan, and that he would not receive adequate state protection, he was not satisfied that the applicant faced a real chance of persecution throughout Pakistan as a whole.

²⁹ see *Tran* at [31]; *WZAWB v Minister for Immigration & Anor* [2016] FCCA 1345 at [51]

³⁰ between CB 153 and 168

³¹ [2017] FCCA 308

44. Likewise, the applicant does not allege any jurisdictional error in relation to the delegate's conclusion, in relation to the complementary protection criteria in s.36(2)(aa) of the Migration Act, that he was not satisfied that the applicant has a real risk of significant harm if he was returned to Pakistan, as it was reasonable for the applicant to relocate to an area within Pakistan where he would not face a real risk of serious harm.
45. Rather, the applicant appears to be seeking review of the delegate's decision that he was satisfied that the applicant meets the definition of an "excluded fast track review applicant" in s.5(1) of the Migration Act, which in turn was because he was not satisfied that the applicant had provided a reasonable explanation for providing a bogus document in response to a request made to him under s.91W(1) of that Act.
46. An "excluded fast track review applicant" is defined in s.5(1) of the Migration Act as relevantly:

A fast track applicant:

(a) *who, in the opinion of the Minister:*

(i) ...

(vi) *without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or the Minister (or causes such a document to be so provided, given or presented) in support of his or her application.*

47. The term "bogus document" is defined in s.5(1) of the Migration Act as:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) *purports to have been, but was not, issued in respect of the person; or*

(b) *is counterfeit or has been altered by a person who does not have authority to do so; or*

(c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

48. The delegate's reasons for concluding that the Afghan Citizen Proof of Registration card was a bogus document are set out at page 185 of the court book. There is no basis upon which the Court could conclude that this conclusion was legally unreasonable, as the delegate was entitled to reach that conclusion on the material before him³².
49. Likewise, the delegate's reasons for concluding that he was not satisfied that the applicant had provided a reasonable explanation as to why he provided a bogus document³³ cannot be said to be legally unreasonable. On the material before him, the delegate was clearly entitled to form the opinion that the applicant had not provided a reasonable explanation for providing a bogus document.
50. Nor was the applicant denied procedural fairness in relation to the delegate's conclusions that the applicant had provided a bogus document and had not provided a reasonable explanation as to why he had done so. The applicant was invited to comment upon the Department's assessment that the Afghan Citizen Proof of Registration card was a bogus document, and the applicant provided his response. In those circumstances, the allegation that the applicant was denied procedural fairness in respect of the delegate's conclusion that the applicant had not provided a reasonable explanation as to why he had provided a bogus document, cannot be sustained.
51. For the reasons set out above, the applicant's proposed ground of application in relation to the delegate's decision that the applicant is an "excluded fast track review applicant" has no prospects of success.
52. I conclude that the interests of the administration of justice do not require the granting of an extension of time under s.477(2) of the Migration Act.
53. In consequence of the refusal of the extension of time, the Minister seeks an order for costs. Counsel for the Minister initially sought costs in accordance with the Court scale for a final hearing. I declined to award costs in that amount but indicated that I would be willing to award costs of \$5,800, which counsel accepted. The applicant said that

³² see *Minister for Immigration v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 per Crennan and Bell JJ at [130]-[131]

³³ CB 186

he accepted the Court's decision and that he would pay the costs if he is released from immigration detention.

54. I will order that the applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$5,800.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Judge Driver

Date: 20 April 2017